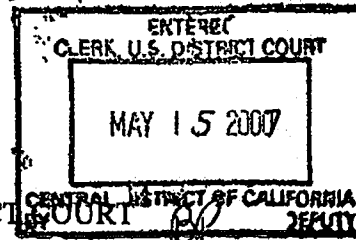
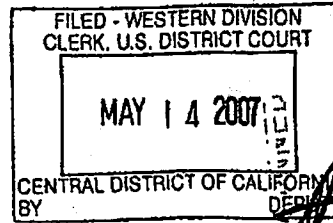


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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

THE MILTON H. GREENE
 ARCHIVES, INC.,

Plaintiff,

v.

CMG WORLDWIDE, INC., an Indiana
 Corporation, and MARILYN MONROE,
 LLC, a Delaware Limited Liability
 Company, ANNA STRASBERG, an
 individual,

Defendants.

CASE NO. CV 05-2200 MMM (MCx)

ORDER GRANTING DEFENDANTS'
 MOTION FOR SUMMARY JUDGMENT

AND CONSOLIDATED ACTIONS

On March 25, 2005, The Milton H. Greene Archives, Inc. filed this action against CMG Worldwide Inc., Marilyn Monroe LLC, and Anna Strasberg. On May 3, 2005, the court consolidated the case with two other actions filed in this district – *Shirley De Dienes et al. v. CMG Worldwide, Inc. et al.* (No. CV 05-2516)¹ and *Tom Kelley Studio, Inc. v. CMG Worldwide,*

¹The *De Dienes* action was dismissed without prejudice on February 2, 2006, pursuant to the parties' stipulation.

1 *Inc. et al.* (No. CV 05-2568).² On December 14, 2005, the court consolidated two additional
2 actions with the pending case – *CMG Worldwide, Inc., et al. v. Tom Kelley Studios* (No. CV 05-
3 5973) and *CMG Worldwide, Inc., et al. v. The Milton H. Green Archives, Inc.* (No. CV 05-
4 7627).³ These actions were originally filed by CMG Worldwide, Inc. and Marilyn Monroe, LLC
5 (the “CMG Parties” or “plaintiffs”) in the United States District Court for the Southern District
6 of Indiana, and were transferred to this district pursuant to 28 U.S.C. § 1404(a) on August 9,
7 2005.⁴ All of the actions seek to have the court resolve competing claims to ownership of the
8 legal right to use, license, and distribute certain photographs of Marilyn Monroe.

9 In their complaints against the Milton H. Green Archives, Inc. and Tom Kelley Studios,
10 Inc. (the “MHG Parties” or “defendants”), the CMG Parties assert that they own the “Right of
11 Publicity and Privacy in and to the Marilyn Monroe name, image, and persona” that was created
12 by “the Indiana Right of Publicity Act, I.C. § 32-36-1-1 et seq., and other applicable right of
13 publicity laws.” The CMG Parties contend that defendants have infringed this right by using
14 Marilyn Monroe’s name, image and likeness “in connection with the sale, solicitation, promotion,
15 and advertising of products, merchandise, goods and services” without their consent or
16 authorization.⁵

17 On October 6, 2006, the MHG Parties filed a motion for summary judgment. They argue,
18 *inter alia*, that plaintiffs’ right of publicity claims are preempted by the Copyright Act, 28 U.S.C.
19 §§ 101-1332, and that, even if the claims are not preempted, plaintiffs have failed to adduce any
20
21

22 ²Tom Kelley Studio, Inc. sued the same defendants as did The Milton H. Greene Archive,
23 Inc. – CMG Worldwide Inc., Marilyn Monroe LLC, and Anna Strasberg.

24 ³Anna Strasberg was not a party to the Indiana actions.

25 ⁴On February 6, 2006, the court issued a scheduling order, which denominated the CMG
26 Parties plaintiffs and the MHG Parties defendants for purposes of the consolidated actions. The
27 court based this order on the fact that the CMG Parties’ Indiana action was the first filed action.

28 ⁵Plaintiffs’ First Amended Complaint against Milton H. Greene Archives, Inc., ¶¶ 7, 24-
26; Plaintiffs’ First Amended Complaint against Tom Kelley Studios, Inc., ¶¶ 7, 28-30.

1 evidence that they have standing to assert claims based on Marilyn Monroe's right of publicity.⁶
2 In essence, defendants argue that, even if a posthumous right of publicity in Monroe's name,
3 image and likeness exists, plaintiffs cannot show that they are presently in possession of that
4 right.⁷

6 I. FACTUAL BACKGROUND

7 The parties expend considerable effort attempting to create triable issues of fact by
8 objecting to nearly every piece of evidence adduced by their opponent in support of or in
9 opposition to the motion for summary judgment. After reviewing the applicable law, however,
10 the court concludes that resolution of this motion turns on a limited number of facts that are
11 undisputed. Before discussing those undisputed facts, the court addresses defendants' "request
12 to strike," which seeks to have the court strike the bulk of the evidence adduced by plaintiffs in
13 opposition to the summary judgment motion.

14 A. The Request To Strike

15 Defendants contend that virtually all of the evidence plaintiffs submitted in support of their
16 opposition should be excluded because it was not adequately identified in plaintiffs' initial
17 disclosures, and because it was improperly withheld from defendants during discovery.⁸ The
18 request is denied.

19 Plaintiffs' initial disclosures adequately identified by "category" the documents they submit

21 ⁶Defendants' Memorandum of Points and Authorities in Support of Their Motion for
22 Summary Judgment ("Defs.' Mem.") at 32-34.

23 ⁷Defendants also argue that (1) Marilyn Monroe was domiciled in New York at the time
24 of her death, such that no right of publicity could survive her passing; (2) even if Marilyn Monroe
25 was not a New York domiciliary at the time of her death, plaintiffs are collaterally and judicially
26 estopped from asserting otherwise; (3) Indiana's right of publicity statute does not apply to
27 Marilyn Monroe; and (4) plaintiffs' claims are barred by laches. Defendants' motion also
28 challenged plaintiffs' copyright infringement claims (see *id.* at 43-47); those claims have since
been dismissed without prejudice pursuant to the parties' stipulation.

⁸See Objections to and Request To Strike Evidence Submitted in Plaintiffs' Opposition to
Defendants' Motion for Summary Judgment.

1 in opposition to defendants' motion for summary judgment. Plaintiffs stated, for example, that
2 they would rely on documents that established Marilyn Monroe's domicile at the time of her death
3 (as did defendants), and on documents supporting their claim that defendants were aware of and
4 recognized plaintiffs' asserted rights in Marilyn Monroe's right of publicity. This is all that is
5 required by Rule 26(a)(1)(B) of the Federal Rules of Civil Procedure. See *DE Technologies, Inc.*
6 *v. Dell Inc.*, 238 F.R.D. 561, 566 (W.D. Va. 2006) ("Dell correctly argues that the initial
7 disclosure required by Rule 26 does not require the production of the documents upon which a
8 party intends to rely. Instead, in lieu of production, Rule 26 allows a party to provide 'a
9 description by category and location of, all documents . . . that are in the possession, custody,
10 or control of the party and that the disclosing party may use to support its claims or defenses,
11 unless solely for impeachment"); *Sizemore v. Wal-Mart Stores, Inc.*, No. Civ.A. H-05-1589,
12 2006 WL 1698291, *3 (S.D. Tex. June 16, 2006) ("Plaintiff states in her Response that Wal-Mart
13 identified relevant documents in its Initial Disclosures but did not produce the documents. Rule
14 26(a) of the Federal Rules of Civil Procedure, however, requires only that the documents be
15 described by category and location. . ."); *CP Solutions PTE, Ltd. v. General Elec. Co.*, No.
16 3:04cv2150(JBA)(WIG), 2006 WL 1272615, *1 (D. Conn. Feb. 6, 2006) ("The disclosing party,
17 however, does not have to produce actual documents. It can comply fully with its initial
18 disclosure obligation by providing a description by category and location of all documents, data
19 compilations, and tangible things it expects to use during the proceeding"). Additionally,
20 plaintiffs represent that many of the documents they proffer in support of their opposition to the
21 pending motion were not in their possession, custody or control at the time they made initial
22 disclosures. See FED.R.CIV.PROC. 26(a)(1)(B) (requiring disclosure of "all documents,
23 electronically stored information, and tangible things that are in the possession, custody, or
24 control of the party and that the disclosing party may use to support its claims or defenses, unless
25 solely for impeachment").

26 Defendants' contention that plaintiffs abused the discovery process by "producing"
27 documents for the first time in opposition to defendants' motion is also unavailing. As plaintiffs
28 note, neither party produced *any* documents before defendants' motion for summary judgment was

1 filed.⁹ Indeed, defendants concede that their motion – which was filed less than two months after
2 the parties first served written discovery on one another – was “a ‘show me’ motion” directed
3 at Plaintiffs’ claims and their lack of basis.”¹⁰ If this was defendants’ intent, plaintiffs’ opposition
4 provided exactly what defendants sought – information regarding the “basis” of plaintiffs’ claims.

5 Defendants, moreover, did not move to compel further responses to their discovery
6 requests before filing the motion, a recognized first step in enforcing an opponent’s discovery
7 obligations. See FED.R.CIV.PROC. 37(a). Rather, they sought an order striking all of plaintiffs’
8 evidence. Such an order may be entered under Rule 37(d) where a party fails to serve a written
9 response to a request to produce or written answers or objections to interrogatories. See
10 FED.R.CIV.PROC. 37(d); see also 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus,
11 FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2291, at 720 (1994) (“If [a party] serves a
12 response, but fails to say that inspection will be permitted as requested or fails to permit the
13 inspection itself a motion under Rule 37(a) to compel inspection is available, but Rule 37(d) is
14 inapplicable”); *id.* (“The provisions of Rule 37(d) with regard to interrogatories do not apply ‘for
15 anything less than a serious or total failure to respond to interrogatories’”). There is no evidence
16 that plaintiffs failed to serve a written response to defendants’ document production request or
17 written answers and objections to interrogatories; rather, it appears that defendants did not believe
18 the responses they received were adequate or complete. The proper forum for defendants’
19 discovery dispute with plaintiffs is therefore a hearing on a motion to compel before the
20 magistrate judge. Finally, to the extent Rule 37(d) is applicable, the court finds, under the
21 circumstances of this case, that it would not be “just” to strike all of plaintiffs’ evidence. See
22 FED.R.CIV.PROC. 37(d) (stating that the court “may make such orders in regard to the failure as
23 are just”).

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26 ⁹See Plaintiffs’ Opposition to Defendants’ Objections to and Request to Strike Evidence
in Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment at 4.

27 ¹⁰Defendants’ Reply in Support of Objections to Strike Evidence Submitted in Plaintiffs’
28 Opposition to Defendants’ Motion for Summary Judgment, at 6 n. 5, 10 n. 7.

B. Undisputed Facts in the Summary Judgment Record

Milton H. Greene and Tom Kelley, Sr. were professional photographers and contemporaries of Marilyn Monroe.¹¹ Defendants purport to own copyrights in various photographs of Marilyn Monroe that Greene and Kelley took during her lifetime.¹² Plaintiffs allege that defendants are using the photographs "on or in connection with the sale, solicitation, promotion, and advertising of products, merchandise, goods and services" without their authorization or consent,¹³ and thus that they are violating a right of publicity in Marilyn Monroe's name, image, and likeness that purportedly passed to plaintiffs through her will.¹⁴

Marilyn Monroe died testate on August 5, 1962.¹⁵ Her will, which did not expressly bequeath a right of publicity, contained the following residuary clause:

SIXTH: All the rest, residue and remainder of my estate, both real and personal, or whatsoever nature and wheresoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:

¹¹Defendants' Statement of Uncontroverted Facts and Conclusions of Law Submitted in Support of Their Motion for Summary Judgment ("Defs.' Facts"), ¶ 1; Plaintiffs' Statement of Genuine Issues of Material Fact ["MF"] and Additional Material Facts ["AMF"] in Response to Defendants' Statement of Uncontroverted Facts in Support of Defendants' Motion for Summary Judgment ("Pls.' Facts"), MF ¶ 1.

¹²Defs.' Facts, ¶¶ 4, 8. Plaintiffs dispute this fact. (See Pls.' Facts, MF ¶¶ 4, 8.) Whether defendants own copyrights in photographs of Marilyn Monroe is immaterial to court's resolution of the motion, however.

¹³Plaintiffs' First Amended Complaint Against Milton H. Greene Archives, Inc., ¶¶ 7, 24-26; Plaintiffs' First Amended Complaint Against Tom Kelly Studios, Inc., ¶¶ 7, 28-30.

¹⁴Pls.' Facts, AMF ¶¶ 20-22; Defendants' Response to Plaintiffs' Statement of Genuine Issues of Material Fact and Additional Material Facts Re Defendant's Motion for Summary Judgment ("Defs.' Reply Facts"), AMF ¶¶ 20-22 (disputing this fact only to the extent it states the legal conclusion that Marilyn Monroe's right of publicity passed through her will).

¹⁵Pls.' Facts, AMF ¶ 10; Defs.' Reply Facts, AMF ¶ 10.

1 (a) To MAY REIS the sum of \$40,000.00 or 25% of the total remainder of my
2 estate, whichever shall be the lesser.

3 (b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her as
4 set forth in ARTICLE FIFTH (d) of this my Last Will and Testament.

5 (c) To LEE STRASBERG the entire remaining balance.¹⁶

6 The will was subject to primary probate in New York.¹⁷

7 8 II. DISCUSSION

9 A. Standard Governing Motions for Summary Judgment

10 A motion for summary judgment must be granted when "the pleadings, depositions,
11 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that
12 there is no genuine issue as to any material fact and that the moving party is entitled to a judgment
13 as a matter of law." FED.R.CIV.PROC. 56(c). A party seeking summary judgment bears the
14 initial burden of informing the court of the basis for its motion and identifying those portions of
15 the pleadings and discovery responses that demonstrate the absence of a genuine issue of material
16 fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have
17 the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no
18 reasonable trier of fact could find other than in its favor. On an issue as to which the nonmoving
19 party will have the burden of proof, however, the movant can prevail merely by pointing out that
20 there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving
21 party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise
22 provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v.*
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); FED.R.CIV.PROC. 56(e).

24 In viewing evidence at the summary judgment stage, the court does not make credibility

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26 ¹⁶Declaration of Greg T. Hill Submitted in Support of Defendants' Motions for Summary
27 Judgment, Exhibit 13; Declaration of Anna Strasberg in Support of Plaintiffs' Opposition to
28 Defendants' Motion for Summary Judgment, Exhibit C.

¹⁷Defs.' Facts, ¶¶ 16, 18-19; Pls.' Facts, AMF ¶ 26.

determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). The evidence presented by the parties must be admissible. FED.R.CIV.PROC. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir. 1985); *Thornhill Pub'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

B. Whether Plaintiffs' Right of Publicity Claims Are Preempted by the Copyright Act

As a threshold matter, the court must determine whether plaintiffs' right of publicity claims are preempted by the Copyright Act. State law claims are preempted by the Copyright Act only if (1) they concern a work that is within the subject matter of copyright and (2) the state law rights asserted are "equivalent" to rights protected by copyright law. See 17 U.S.C. § 301(a); *Laws v. Sony Music Entertainment*, 448 F.3d 1134, 1138-39 (9th Cir. 2006); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001); see also *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 909 (7th Cir. 2005). State law claims are not "equivalent" if they contain "an element which changes the nature of the action 'so that it is qualitatively different from a copyright infringement claim.'" *Summit Machine Tool Manufacturing Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434, 1439-40 (9th Cir. 1993); see also *Laws*, 448 F.3d at 1144 (noting that "[t]he mere presence of an additional element . . . is not enough to qualitatively distinguish [a plaintiff's] right of publicity claim from a claim in copyright"; instead, that "extra element must transform the [underlying] nature of the action").

The parties dispute which of two Ninth Circuit decisions – *Laws* or *Downing* – provides the standard for evaluating preemption in this case. The court concludes that *Downing* is the applicable precedent. There, the Ninth Circuit considered whether a state law right of publicity claim based on use of a copyrighted photograph was preempted by the Copyright Act. Retailer Abercrombie & Fitch used a copyrighted photograph of plaintiffs, who were surfers, in a surf-themed sales catalogue promoting its clothing lines. Abercrombie published the photograph

1 without obtaining the surfers' consent, having purchased it earlier from a professional surf
2 photographer. *Downing*, 265 F.3d at 1000. The catalogue identified the surfers by name, and
3 offered T-shirts identical to those they wore in the photograph for sale. *Id.* The Ninth Circuit
4 held that the surfers' right to control the use of their name, image, and likeness, which was the
5 basis for their claim, was not the "subject matter" of copyright. It stated:

6 "The photograph itself, as a pictorial work of authorship, is subject matter
7 protected by the Copyright Act. . . . However, it is not the publication of the
8 photograph itself, as a creative work of authorship, that is the basis for [the
9 surfers'] claims, but rather, it is the use of [their] likenesses and their names
10 pictured in the published photograph. . . . A person's name or likeness is not a
11 work of authorship within the meaning of 17 U.S.C. § 102. This is true
12 notwithstanding the fact that [the surfers'] names and likeness are embodied in a
13 copyrightable photograph." *Id.* at 1003-04 (citation omitted).

14 In reaching this conclusion, the Ninth Circuit relied, *inter alia*, on Professor McCarthy's treatise
15 on the right of publicity and privacy, which states:

16 "The 'subject matter' of a Right of Publicity claim is not a particular picture or
17 photograph of plaintiff. Rather, what is protected by the Right of Publicity is the
18 very identity or persona of the plaintiff as a human being. . . . While copyright in
19 a given photograph may be owned by the person depicted in it, the exact image in
20 that photograph is not the underlying 'right' asserted in a Right of Publicity case.
21 To argue that the photograph is identical with the person is to confuse illusion and
22 illustration with reality. Thus, assertion of infringement of the Right of Publicity
23 because of defendant's unpermitted commercial use of a picture of plaintiff is not
24 assertion of infringement of copyrightable 'subject matter' in one photograph of
25 plaintiff." J. Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 11.13[C],
26 at 11-72-73 (1997) (quoted in *Downing*, 265 F.3d at 1004).

27 The *Downing* court also concluded that the second prerequisite to copyright preemption was not
28 met, because "the subject matter of the [the surfers'] . . . right of publicity claims is their names

1 and likenesses, which are not copyrightable, [and therefore] the claims are not equivalent to the
2 exclusive rights contained in § 106." *Id.* at 1005.

3 *Downing* compels the conclusion that plaintiffs' right of publicity claims are not preempted
4 by the Copyright Act. Plaintiffs allege that defendants have exploited Marilyn Monroe's name,
5 image, and likeness – as embodied in photographs defendants purport to have copyrighted – "on
6 or in connection with the sale, solicitation, promotion, and advertising of products, merchandise,
7 goods and services" without their authorization or consent.¹⁸ Plaintiffs do not challenge
8 defendants' right to publish or otherwise exploit their photographs as "creative work[s] of
9 authorship" protected by copyright. Rather, they contend that defendants are commercially
10 exploiting Marilyn Monroe's name, image and likeness by licensing photographs containing her
11 image to third-party vendors for use in promoting various consumer products. The *Downing* court
12 held that claims based on precisely this kind of use of copyrighted photographs were not
13 preempted by federal law.

14 Defendants dispute this, and contend that *Laws*, rather than *Downing*, controls. They
15 assert that *Laws* held that right of publicity claims are preempted if they are based solely on
16 commercial exploitation of copyrighted works.¹⁹ They also argue that the *Laws* court
17 distinguished *Downing* on the basis that Abercrombie did not simply exploit the copyrighted
18 photographs commercially, but suggested that plaintiffs endorsed its products by using their names
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21 ¹⁸Plaintiffs' First Amended Complaint Against Milton H. Greene Archives, Inc., ¶¶ 7, 24-
22 26; Plaintiffs' First Amended Complaint Against Tom Kelly Studios, Inc., ¶¶ 7, 28-30. Plaintiffs
23 contend that defendants' pleadings in the consolidated cases constitute judicial admissions that they
24 have used purportedly copyrighted photographs to exploit Marilyn Monroe's name, image, and
25 likeness commercially. (See Plaintiffs' Opposition to Defendants' Motion for Summary Judgment
26 ("Pls.' Opp.") at 39 (citing Milton H. Greene Archives, Inc. Complaint Against CMG Worldwide
27 Inc. et al., ¶ 18 ("[MHG] photographs have been used for, among other things, advertising,
magazines, calendars, and on wine bottles. Such licenses can run as much as \$25,000 for a single
use of one Marilyn Monroe photograph"); Tom Kelley Studio, Inc. Complaint Against CMG
Worldwide, Inc. et al., ¶¶ 16, 30 (alleging that Kelley Studios "works to . . . commercialize [its]
photographs" and to "commercially exploit the images of Marilyn Monroe").)

28 ¹⁹Defendants' Reply in Support of Motion for Summary Judgment ("Defs.' Reply") at 22.

1 and reproducing the T-shirts they wore.²⁰ Defendants argue that, in contrast to Abercrombie, they
2 have done nothing more than license their photographs for commercial purposes. They assert
3 there is no evidence that they have licensed Marilyn Monroe's name, suggested her endorsement
4 of a particular product, or allowed their photographs to be used on products that look like those
5 being used by Monroe in the photographs.²¹

6 Defendants' reliance on *Laws* is unavailing. There, the Ninth Circuit held that, when a
7 copyrighted sound recording is produced, the singer's interest in her "voice" and the copyright
8 holder's interest in the recording as "an original work[] of [creative] authorship" merge, so that
9 the Copyright Act preempts claims based on licensing of the sound recording for commercial
10 purposes, e.g., in advertising campaigns. *Laws*, 448 F.3d at 1139-41 ("Although California law
11 recognizes an assertable interest in the publicity associated with one's voice, we think it is clear
12 that federal copyright law preempts a claim alleging misappropriation of one's voice when the
13 entirety of the allegedly misappropriated vocal performance is contained within a copyrighted
14 medium"). In reaching this result, the *Laws* court recognized that use of copyrighted photographs
15 in advertising implicates a separate set of interests, and thus that such uses "are distinguishable"
16 from the commercial licensing of a sound recording. *Id.* at 1141. In this regard, it acknowledged
17 *Downing's* holding that "a person's name or likeness is not a work of authorship within the
18 meaning of [the Copyright Act]" *id.* (quoting *Downing*, 265 F.3d at 1004), and implicitly
19 recognized that an individual's likeness does not merge with a photograph that is a "work of
20 [creative] authorship" in the same manner that an artist's voice merges with a copyrighted sound
21 recording. See also 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT
22 § 1.01[B][1][c], at 1-28 (2006) ("[N]ame and likeness do not become a work of authorship simply
23 because they are embodied in a copyrightable work").²² In short, the *Laws* court distinguished

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25 ²⁰*Id.*

26 ²¹*Id.* at 22-23.

27 ²²In contrast, the *Laws* court noted that, like a person's "voice" captured on a sound
28 recording during a vocal performance, a person's "likeness" captured on film during a dramatic

1 a photographer's creative work, which is separate from the "likeness" of the person whose image
2 is captured in the photograph, from a singer's creative work, which merges with the "voice" she
3 uses to record. Given this merger, the court stated, the singer's assertion of a right of publicity
4 in her voice necessarily "challeng[ed] control of the artistic work itself," and therefore concerned
5 the subject matter of copyright. *Laws*, 448 F.3d at 1142; see also *Toney*, 406 F.3d at 910
6 ("Toney's identity is not fixed in a tangible medium of expression. There is no 'work of
7 authorship' at issue in Toney's right of publicity claim. A person's likeness - her persona - is
8 not authored and it is not fixed. The fact that an image of the person might be fixed in a
9 copyrightable photograph does not change this," quoted in *Laws*, 448 F.3d at 1142).²³

10 Consequently, the court concludes that *Downing*, not *Laws*, controls, and that plaintiffs'
11 right of publicity claims are not preempted by the Copyright Act.²⁴ Unlike a voice captured in
12 a sound recording, Marilyn Monroe's "likeness" did not merge with defendants' photographs so
13 completely that she (or her successors-in-interest) cannot assert an interest in her persona separate
14 and distinct from defendants' interest in their photographs as creative works of art.

15
16 performance merges with the creative work of authorship itself. As a result, it suggested, the
17 Copyright Act *would* preempt a right of publicity claim based on a copyright holder's screening
18 of a motion picture that embodied an actor's "name, pictures, and likeness without [his] consent."
19 *Laws*, 448 F.3d at 1142-43 (discussing *Fleet v. CBS, Inc.*, 50 Cal.App.4th 1911 (1996)); see also
20 *Downing*, 265 F.3d at 1005 n. 4 ("In *Fleet*, the plaintiffs were actors in a copyrighted film. The
21 claims of the plaintiffs were based on their dramatic performance in a film CBS sought to
22 distribute. . . . This is clearly distinguishable from this case where the Appellants' claim is based
23 on the use of their names and likenesses, which are not copyrightable").

24 ²³Defendants assert that the *Laws* court questioned *Toney*'s reasoning. (Defs.' Reply at 23
25 n. 28.) The court disagrees. The *Laws* court simply found that *Toney* - which involved
26 commercial exploitation of a copyrighted photograph rather than commercial exploitation of a
27 copyrighted sound recording - was inapposite in resolving the preemption issue before it.

28 ²⁴One other court that has considered precisely this issue is in accord. See *Bonner v. Fuji*
Photo Film, No. C 06-4274 CRB, 2006 WL 3327894, *2 (N.D. Cal. Nov. 13, 2006) (stating,
in a case that involved the alleged misappropriation of plaintiff's photograph for use on the
packaging of disposable cameras, that "[d]efendant's effort to force this case under the umbrella
of *Laws* is utterly unpersuasive. . . . The Court concludes that this case is squarely controlled by
the surfers' case and not the singer's").

C. Whether Plaintiffs Have Demonstrated That They Own Marilyn Monroe's Posthumous Right of Publicity

In their motion for summary judgment, defendants argue that plaintiffs cannot show they have standing to assert claims based on Marilyn Monroe's right of publicity.²⁵ They contend that, even if a posthumous right of publicity in Marilyn Monroe's name, likeness and persona exists, plaintiffs cannot establish that they are the owners of that right.²⁶

²⁵Defs.' Mem. at 32-34.

²⁶Defendants argue that, as a mere licensee of Marilyn Monroe's purported right of publicity, CMG lacks "the requisite ownership interest" to "sue on violations of rights [it] merely represent[s] on behalf of [its] principals." (*Id.* at 33.) This argument lacks merit. Under the licensing agreement between Marilyn Monroe LLC ("MMLLC") and CMG, CMG was appointed the "sole and exclusive licensing agent world-wide" for "merchandising and advertising" Marilyn Monroe's right of publicity. (See Pls.' Facts, AMF ¶¶ 18; Defs.' Reply Facts, AMF ¶¶ 18.) To the extent, therefore, that MMLLC owns and is capable of licensing Marilyn Monroe's right of publicity, CMG has standing to sue for violation of that right. See *MJ & Partners Restaurant Ltd. Partnership v. Zadikoff*, 10 F.Supp.2d 922, 930 (N.D. Ill. 1998) (noting that the "weight of authority" favors the view that "a[n] [exclusive] licensee of a celebrity's name may state a cause of action for misappropriation of the right to publicity"); *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F.Supp. 1188, 1199-1200 (S.D.N.Y. 1983) ("Plaintiff Bi-Rite, as the exclusive licensee of various rock groups, may also assert this [right of publicity] claim. Unlike privacy rights, which protect personality and feelings and are therefore not assignable, the right of publicity gives rise to a 'proprietary' interest in the commercial value of one's persona which is assignable and may be freely licensed. This proprietary interest is much like a copyright; it embodies a bundle of exclusive marketing rights which its holder may transfer in its entirety by an assignment or in part by exclusive licenses. Holders of exclusive licenses gain standing to protect their interests against all who would encroach on the exclusive rights embodied in the licenses" (citations omitted)), opinion supplemented on other grounds, 578 F.Supp. 59 (S.D.N.Y. 1983); see also 2 J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 10:53 (2d ed. 2005) ("A licensee of exclusive rights of publicity has standing to sue for infringements which impinge upon its area of exclusive rights as defined in the license").

The authorities cited by defendants for the proposition that CMG lacks standing to sue (see Defs.' Reply at 18 n. 22) are inapposite. See *Exhibitors' Serv., Inc., v. Am. Multi-Cinema, Inc.*, 788 F.2d 574, 578-79 (9th Cir. 1986) (holding, on the specific facts of the case, that a motion picture licensing agent was not a "proper party" to assert an antitrust claim against motion picture exhibitors because its injury "was not of the type the antitrust laws were intended to forestall" (internal quotation marks omitted)); *Pickett v. IBP, Inc.*, 197 F.R.D. 510, 516 (M.D. Ala. 2000) (holding that "feedlot" owners lacked standing to "bring suit to recover for the injuries suffered by the owners of cattle which they fed and marketed").

1 Plaintiffs counter:

2 "It is undisputed that in her last will and testament Marilyn Monroe devised 75%
3 of the 'rest, residue and remainder of [her] estate, both real and personal, or
4 whatsoever nature and whatsoever situate . . . to which I shall be in any way
5 entitled' to Lee Strasberg, her close friend and acting coach. By definition, this
6 personal property included the right of publicity, and courts have uniformly held
7 that the right of publicity is a property right. When Lee Strasberg died, Ms.
8 Monroe's publicity rights passed by will to his wife, Anna Strasberg. In 2001,
9 Mrs. Strasberg formed MMLLC and transferred, along with the 25% interest
10 holder, all of her rights and interests in the estate of Marilyn Monroe, including,
11 but not limited to, the right of publicity, to MMLLC."²⁷

12 Citing these transfers, plaintiffs assert "[t]he chain of title to Marilyn Monroe's Right of Publicity
13 is simple."²⁸

14 Defendants argue that title to Marilyn Monroe's right of publicity could not have passed as
15 plaintiffs contend, since "no post mortem [right of publicity] existed in 1962 under either New
16 York[,] . . . California [or Indiana] law and . . . [thus] none could have been transferred by will
17 or through the New York surrogate proceedings."²⁹ Additionally, they contend that "Ms. Monroe
18 could not transfer what she did not have and [that] her Will plainly transferred only property she
19 was seized in and had possession of at the time of her death."³⁰

20 **1. Whether Marilyn Monroe Could Transfer By Will a Statutory Publicity**
21 **Right that Was Not Created Until After Her Death**

22 As a general principle of probate law, "under no circumstances, in the absence of a valid
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24 ²⁷Pls.' Opp. at 36.

25 ²⁸*Id.* at 35.

26 ²⁹Defs.' Reply at 17.

27 ³⁰*Id.*

1 power, can any amount of testamentary intent produce the effect of subjecting property not owned
2 by a testator at the date of his death to any disposition whatever." *In re Van Winkle's Will*, 86
3 N.Y.S.2d 597, 600 (Sur. Ct. 1949). This rule applies to wills probated in New York, see *id.*; see
4 also N.Y. EST. POWERS & TRUSTS LAW § 3-3.1 (formerly N.Y. DECEDENT EST. LAW § 14),³¹ as
5 well as to wills probated in California.³² See, e.g., *In re Buzza's Estate*, 194 Cal.App.2d 598, 601

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8 ³¹This provision states: "Unless the will provides otherwise, a disposition by the testator
9 of all his property passes all of the property he was entitled to dispose of *at the time of his death*."
10 N.Y. EST. POWERS & TRUSTS LAW § 3-3.1 (formerly N.Y. DECEDENT EST. LAW § 14) (emphasis
11 added). Plaintiffs concede that the phrase "[u]nless the will provides otherwise" was inserted in
12 the statute to alter the common law rule that real property acquired by a testator after the
13 execution of her will (but prior to death) did not pass through the will's residuary clause.
14 (Plaintiffs' Supplemental Brief in Support of Plaintiffs' Opposition to Defendants' Motion for
15 Summary Judgment ("Pls.'s Supp. Brief") at 8-9.) They argue, however, that the phrase should
16 be interpreted to mean that a testator can pass property she did not own at the time of her death
17 by including appropriate language in her will. (*Id.*) Under New York law, the phrase "[u]nless
18 the will provides otherwise" makes the statutory provision that a disposition of "all . . . property"
19 passes all property owned at the time of death a presumption rather than a mandatory rule. See,
20 e.g., *In re Will of McDonald*, 456 N.Y.S.2d 657, 659 (Sur. Ct. 1982) (stating that, as used in the
21 New York probate code, the phrase "unless the will provides otherwise" indicates that the
22 legislature intends to permit testators to opt out of the requirement in question). In the context
23 of § 3-3.1, the provision permits a testator to state in his will that she intends to pass only such
24 property as she owns at the time of the will's execution, rather than all property owned at death.
25 It does not permit the testator to pass rights to property that have not yet come into being as of
26 the time of death. As a result, the statute is not inconsistent with the general principle of probate
27 (and property) law articulated in *Van Winkle's Will*. This is made clear by the *Van Winkle* court's
28 observation that although no "amount of testamentary intent" can "subject[] property not owned
by a testator at the date of his death to any disposition whatsoever," a testator's "will is operative
as to all the property of which the testator died seized or possessed, *provided only that the words
of the will are appropriate to the complete disposition of all property belonging to the estate. . . .*"
Van Winkle's Will, 86 N.Y.S.2d at 600 (emphasis added).

24 ³²As a result, the court is not required to conduct a choice of law analysis in order to
25 determine whether Marilyn Monroe had testamentary power to bequeath a posthumous right of
26 publicity through her will. Typically, such questions are decided by reference to the law of the
27 testator's domicile, see, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(2) (formerly
28 DECEDENT EST. LAW § 47) ("The intrinsic validity, effect, revocation or alteration of a
testamentary disposition of personal property, and the manner in which such property devolves
when not disposed of by will, are determined by the law of the jurisdiction in which the decedent
was domiciled at death"); *In re Moore's Estate*, 190 Cal.App.2d 833, 841-42 (1961) (recognizing

(1961) ("It is settled law that a will is construed as applying to and disposing of the estate in its condition at the time of death. A testator may dispose only of such property as is subject to his testamentary power, and the testator is presumed to know the law. In interpreting a will, a court should view the will in a manner which will reveal the intent of the testator as disclosed by the language in the will and, if possible, effectuate that intent. This does not mean, however, that a testator may validly dispose of non-existent property" (citations omitted)); see also *McKay v. Lauriston*, 204 Cal. 557, 569-70 (1928) ("[I]f . . . the wife had no vested interest in the community property [before death], and upon her death her mere expectancy or inchoate interest therein ceased and terminated, after her death there was no property, nor any interest in any property, to which either the husband or any other person could succeed to by descent or succession or by any other means or method").³³

that, under California Civil Code § 946, a decedent's personal property should be distributed according to the law of his or her domicile). No party argues that Marilyn Monroe was domiciled in a state other than California or New York at the time of her death. Since both California and New York treat property not owned by a testator at death in the same fashion, the court need not resolve which state's law applies. As a result, the parties' factual dispute regarding Marilyn Monroe's domicile at the time of her death does not preclude the entry of summary judgment on the right of publicity claims.

³³As noted, this is a general principle of probate law that is applicable in many, if not all, states. See, e.g., *In re Estate of Braman*, 258 A.2d 492, 494 (Pa. 1969) ("During his lifetime, a person cannot give or dispose of property which he does not own or in which he has no interest; no more so can a person make a post-mortem distribution of property which at the time of his death he does not own or in which he has no right, legal or equitable"); *Ware v. Beach*, 322 P.2d 635, 639 (Okla. 1958) ("[P]roperty descends upon death and vests immediately in the heirs, legatees and devisees, subject only to control of the county court for purposes of administration. Since one has a vested right in property to which he succeeds . . . under the will of a decedent immediately upon the death of the decedent, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of death of the decedent" (citations omitted)); *Conlee v. Conlee*, 269 N.W. 259, 263 (Iowa 1936) ("No matter what the provisions of the will are when probated, it confers no rights in property not owned by the testator at the time of her death, and in no event could it be made to avoid contractual obligations assumed during her life," quoting *Steward v. Todd*, 173 N.W. 619, 624 (Iowa 1919)); 80 AM.JUR.2D WILLS § 1168 ("A person cannot make a postmortem distribution of property which he or she did not own, at the time of his or her death, or in which such a person had [no] legal or equitable right. Thus, property acquired by a testator's estate after his or her death may not pass under the

1 It is undisputed that none of New York,³⁴ California,³⁵ or Indiana³⁶ recognized a

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4 residuary clause of the will"); 96 C.J.S. WILLS § 1088 (same).

5 ³⁴Neither New York statutory nor common law recognizes a descendable, posthumous right
6 of publicity. See, e.g., *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990)
7 (observing that, under New York law, the right of publicity is exclusively statutory, is personal
8 to the individual, and is extinguished upon his death (citing, *inter alia*, *Smith v. Long Island*
9 *Jewish-Hillside Medical Center*, 499 N.Y.S.2d 167, 168 (App. Div. 1986), and *Stephano v. News*
10 *Group Pubs.*, 474 N.E.2d 580, 584 (N.Y. 1984)); see also 4B William R. Golden & Kathryn E.
11 Diaz, N.Y. PRACTICE: COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, § 83:7 (2d ed.
West 2006) ("[T]he New York Legislature has routinely voted down bills over the years that
would have expanded the right of privacy to reach non-commercial usages or provide a
post-mortem right of publicity").

12 ³⁵California created a descendable, posthumous right of publicity in 1984, with the passage
13 of its post-mortem right of publicity statute. See CAL. CIVIL CODE § 3344.1 (formerly CAL.
14 CIVIL CODE § 990). Before passage of this act, California recognized a common law right of
15 publicity, but that right expired on an individual's death. See *Guglielmi v. Spelling-Goldberg*
16 *Productions*, 25 Cal.3d 860, 861 (1979) ("In *Lugosi v. Universal Pictures*, [25 Cal.3d 813
17 (1979)], we hold that the right of publicity protects against the unauthorized use of one's name,
18 likeness or personality, but that the right is not descendible and expires upon the death of the
19 person so protected"); *Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400, 408-09 (2001)
20 ("In California the right of publicity is both a common law right and a statutory right. . . . [In
21 *Lugosi*], the Supreme Court held that, because the common law right of publicity derived from
22 the right of privacy, it did not survive the death of the person whose identity was exploited and
23 was not descendible to heirs or assignees. In 1984, the Legislature enacted a second statutory
24 right of publicity that was 'freely transferable' to the assignees or passed to the heirs of deceased
25 persons" (citations omitted)). Any ambiguity in the *Lugosi* court's holding that the common law
26 right of publicity expired at death (see Pls.' Supp. Brief at 15) was dispelled by *Comedy III*
27 *Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 391 (2001). There, the California
28 Supreme Court clearly stated that in its earlier decision in *Lugosi*, it had "held . . . that the
[common law right of publicity] cause of action did not survive the death of the person whose
identity was exploited and was not descendible to his or her heirs or assignees." *Id.*; see also
Gionfriddo, 94 Cal.App.4th at 408-09. The court is bound by these decisions, and may not credit
contrary suggestions by circuit courts. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.
11 (1975) ("[S]tate courts are the ultimate expositors of state law, and [federal courts] are bound
by their constructions except in extreme circumstances not present here," e.g., where the state
court decision violates federal law or is an "obvious subterfuge to evade consideration of a federal
issue" (citations omitted)); *Meusy v. Montgomery Ward Life Ins. Co.*, 943 F.2d 1097, 1099 (9th
Cir. 1991) ("We are bound to follow the decisions of a state's highest court in interpreting that
state's law").

1 descendable, posthumous right of publicity in 1962 when Marilyn Monroe died. As a result, under
2 either New York or California law, Marilyn Monroe could not have passed such a right through
3 the residual clause of her will.³⁷ This is true regardless of her domicile at the time of death and
4 despite any rights thereafter conferred on personalities such as Monroe by either the California or
5 Indiana legislature.³⁸

6 In supplemental briefing submitted following issuance of a tentative ruling on defendants'
7 motion for summary judgment,³⁹ plaintiffs contend that the posthumous rights of publicity
8 conferred by the California and Indiana legislatures in 1984 and 1994 respectively should not be
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10 ³⁶Indiana created a descendable, posthumous right of publicity in 1994, with the passage
11 of the Indiana Right of Publicity Act. See IND. CODE § 32-36-1-1 to -20 (formerly IND. CODE
12 § 32-13-1-1 to -20); *Phillips v. Scalf*, 778 N.E.2d 480, 483 (Ind. App. 2002) (emphasizing that
13 the state's Right of Publicity Act "creates a 'property right' in a personality's right of publicity"
14 (emphasis added)). Before that time, Indiana common law protected the right of publicity through
15 a personal tort action for invasion of privacy. See *Continental Optic Co. v. Reed*, 86 N.E.2d 306,
16 309 (Ind. App. 1949); see also *Time Inc. v. Sand Creek Partners, Inc.*, 825 F.Supp. 210, 212
(S.D. Ind. 1993) (applying Indiana law). As a personal right, this common law right of publicity
was inalienable; under the Indiana survivorship statute, moreover, a cause of action for invasion
of privacy does not survive an individual's death. See IND. CODE § 34-9-3-1.

17 ³⁷In addition, New York law deems certain property interests too speculative to be
18 bequeathed by will, e.g., an individual's "distributive share" in another's estate. See *In re*
19 *Penrose's Estate*, 299 N.Y.S. 844, 846-48 (Sur. Ct. 1937). Rather than passing through an
20 individual's will, such interests – if and when they come into existence – are distributed by the
21 laws of intestacy. See *id.* at 847-48 (holding that a testator could not bequeath by will his possible
22 interest in the estate of his sister, and that the property had to be distributed according to the laws
23 of intestacy). California appears to treat such interests similarly. See CAL. PROBATE CODE
§ 21109-21110 (formerly CAL. PROBATE CODE § 92) (abrogating the common law rule that
bequests to predeceased devisees lapse, and providing that such bequests, if left to a testator's
"kindred," pass to the predeceased devisee's "lineal issue," *but do not pass through the*
predeceased devisee's will).

24 ³⁸This is not to say that the California or Indiana legislature could not vest a posthumous
25 right of publicity *directly* in the residuary beneficiaries of a predeceased personality's estate, or
26 in the successors-in-interest of those residuary beneficiaries. Neither legislature, however, has
seen fit to do so. See *infra* Part II.C.2.

27 ³⁹The court's tentative order was issued to the parties at the oral hearing on defendants'
28 motion for summary judgment on December 11, 2006.

1 considered mere "expectancies" that Marilyn Monroe could not transfer through her will. Rather,
2 they assert, they should be considered property rights that were in existence at the time of Marilyn
3 Monroe's death and that were, "at worst," simply "remote" or "unknown" to her at that time.⁴⁰
4 "The term expectancy describes the interest of a person who merely foresees that he might receive
5 a future beneficence, such as the interest of an heir apparent, or a beneficiary designated by a
6 living insured who has a right to change the beneficiary. . . . [T]he defining characteristic of an
7 expectancy is that its holder has no enforceable right to his beneficence." *In re Marriage of*
8 *Spengler*, 5 Cal.App.4th 288, 298 (1992) (quoting *In re Marriage of Brown*, 15 Cal.3d 838,
9 844-45 (1976)) (citations omitted, alterations original); see also *Hebron v. Hebron*, 456 N.Y.S.2d
10 957, 961 (Sup. Ct. 1982) ("The term expectancy describes the interest of a person who merely
11 foresees that he might receive a future beneficence, such as the interest of an heir apparent. The
12 holder of such expectancy has no enforceable right to his beneficence"). Here, it is clear that at
13 the time of her death, Marilyn Monroe had no right to "enforce" rights of publicity that were
14 statutorily conferred on "personalities" more than 20 years (in California) and 30 years (in Indiana)
15 after her death.⁴¹ As a result, the court cannot accept plaintiffs' suggestion that the California and
16 Indiana statutory rights of publicity were extant but inchoate in 1962.⁴²

17 Alternatively, plaintiffs assert that, even if California's and Indiana's statutory rights of
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20 ⁴⁰See Pls.' Supp. Brief at 7 ("[T]he *Braman* court, quoting the Restatement of Property,
21 defined an expectancy as 'the chance of obtaining property by inheritance or by will from a person
22 now living. Such chances are not in themselves rights in property.' By definition, Ms. Monroe's
23 interest in her right of publicity as of 1962 was not an 'expectancy.' Instead, Ms. Monroe's right
24 of publicity is at worst a remote and unknown property right, which the *Braman* court
25 acknowledges may be devised through a residuary clause," quoting *Braman*, 258 A.2d at 493-94).

26
27 ⁴¹Indeed, there is no evidence in the record that Marilyn Monroe *foresaw* the possibility
28 that either California or Indiana would bestow a "future beneficence" in the form of the statutory
right of publicity upon "personalities."

⁴²Cf. *Blank v. Kirwan*, 39 Cal.3d 311, 330 (1985) (holding that an individual had no
pecuniary interest protected by the tort of intentional interference with prospective economic
advantage in an expectation that a municipality would grant him a particular license, given the
broad discretion vested in the board to grant or deny license applications).

1 publicity were not extant at the time of Marilyn Monroe's death, they could, once created, have
2 vested in Monroe's estate, which remained open until July 19, 2001, and thus could been
3 distributed under the terms of her will.⁴³ This argument too is unavailing. Under New York law,
4 "[t]he estate of a decedent is an entity which comprises all property in the broad sense of the word
5 which a decedent has at death as well as any property transferred before death which for one
6 reason or another can or should be recovered or brought into the estate for testamentary or intestate
7 administration by the fiduciary." *In re Basile's Will*, 313 N.Y.S.2d 513, 516 (Sur. Ct. 1970); see
8 also N.Y. EST. POWERS & TRUSTS LAW § 1-2.6 & practice commentary (1998) (defining an estate
9 for purposes of probate as "the aggregate of property which a person owns"). The definition of
10 "estate" under California law is similar. See *In re Glassford's Estate*, 114 Cal.App.2d 181, 189
11 (1952) ("The word 'estate,' when used in probate proceedings and statutes, is a comprehensive
12 term and is ordinarily applied to describe in a most general fashion the property comprising the
13 assets of a deceased").

14 As a result, an "estate" does not itself "own" any property; rather, it collects the property
15 a decedent owned at her death and distributes that property to her designated devisees. The
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17 ⁴³Pls.' Supp. Brief at 15. Plaintiffs intimate, but do not explicitly argue, that the New
18 York Surrogate Court's order distributing Marilyn Monroe's "Intellectual Property Rights," i.e.,
19 her "participation rights in motion pictures and royalties from the licensing of the [d]ecedent's
20 name, likeness and signature," to plaintiff MMLLC is conclusive. (See *id.* at 14.) To the extent
21 plaintiffs advance this argument, the court disagrees. "[A] state-court judgment commands the
22 same res judicata effects in federal court that it would have in the court that entered it." 18B
23 Charles Allen Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND
24 PROCEDURE: JURISDICTION 2D § 4469, at 70 (2002); see also, e.g., *In re Bybee*, 945 F.2d 309,
25 316 (9th Cir. 1991) (same). Under New York law, a final decree upon judicial settlement of an
26 executor's account is not binding on non-parties to the probate proceeding. See, e.g., *In re Roe's*
27 *Will*, 24 N.E.2d 322, 324 (N.Y. 1939) (holding that a party who neither received notice of nor
28 attended the final accounting and who was not a party to proceedings for the probate of the
decedent's will was not precluded from challenging the surrogate court's disposition of a testator's
property on the ground that the residuary clause of his will was legally ineffective to pass certain
property rights). Because defendants were not parties to the New York proceeding that probated
Marilyn Monroe's will (see Supplemental Declaration of Anna Strasberg in Support of Plaintiffs'
Supplemental Brief in Support of Plaintiffs' Opposition to Defendants' Motion for Summary
Judgment, Exhibit D at 3-4), they are not precluded from arguing that the residual clause of
Marilyn Monroe's will was ineffective to devise posthumous statutory rights of publicity.

1 devisees, as noted, formally take title to the property at the moment of death. This principle is
2 clearly established under both New York⁴⁴ and California⁴⁵ law. As a result, the California and
3 Indiana legislatures could not have vested property directly in Marilyn Monroe's estate in 1984 and
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8 ⁴⁴See, e.g., *In re Williams' Estate*, 295 N.Y.S. 56, 58 (Sur. Ct. 1937) ("Law like nature
9 abhors a vacuum. For this reason it is the prevalent conception that the rights of those succeeding
10 to property upon a death attach immediately, with no intervening hiatus of ownership. . . . The
11 effects of the Statutes of Wills and of Descent are in substance the same. Instead of taking to
12 itself the property of the deceased, the sovereign directs its distribution among persons
13 ascertainable in accordance with its laws. These persons are, by these laws, vested with the
14 ownership of the property from the moment of the death," quoting *Matter of Killough's Estate*,
15 265 N.Y.S. 301, 317 (Sur. Ct. 1933) (citations omitted)), aff'd, 4 N.Y.S.2d 467 (App. Div.
16 1938); *Matter of Hilliard's Estate*, 299 N.Y.S. 788, 806 (Sur. Ct. 1937) ("It is the theory of the
17 law that all valuable property must belong to some one and that devolution of the assets of a
18 decedent to those entitled thereto takes place immediately on death without any intervening hiatus
19 of ownership even though the ascertainment of the identity of such owner may at times be fraught
20 with difficulty or even be presently impossible of absolute determination"), aff'd, 5 N.Y.S.2d 92
21 (App. Div. 1938); 38 N.Y. JURISPRUDENCE 2D: DECEDENTS' ESTATES § 53 (West 2007) ("Upon
22 the death of a person his or her property vests, eo instanti, in his or her heirs or distributees, as
23 the same may be defined by the then existing law. One has a vested right in property to which
24 he or she succeeds under the law of descent and distribution immediately on the death of the
25 ancestor" (footnotes omitted)).

26
27 ⁴⁵See, e.g., CAL. PROBATE CODE § 7000 ("Subject to [administration], title to a decedent's
28 property passes on the decedent's death to the person to whom it is devised in the decedent's last
will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws
governing intestate succession" (emphasis added)); *U.S. Fidelity & Guaranty Co. v. Mathews*,
207 Cal. 556, 559 (1929) ("It is well-settled law that the title of a decedent in and to the
properties of his estate vests immediately upon his death in his heirs subject only to payment of
the debts of the decedent, the funeral expenses, the family allowance and the expenses of
administration"); *Murphy v. Crouse*, 135 Cal. 14, 17 (1901) ("The respondent contends that title
to personal property, wherever situated, is in the domiciliary executor, and that he has the
absolute right to dispose of the same. This is the common-law doctrine, in pursuance of which
it has been said that title to personalty derived from the executor is good the world over. The rule
never prevailed in this state. Here both real and personal property descend directly to the heir or
to the beneficiary named in the will, with a qualified right in the personal representative, who
holds it, for the purposes of administration, more like a receiver than like a common-law
executor. The title is not in him, nor has he the power of disposal, save by order of the court").

1 1994, just as they could not have vested property in Marilyn Monroe herself.⁴⁶ This is true despite
2 the fact that her estate remained open from 1962 to 2001, nearly forty years after her death.⁴⁷

3 Plaintiffs' supplemental brief cites no controlling⁴⁸ authority to the contrary. Plaintiffs rely,
4

5 ⁴⁶Plaintiffs do not appear to argue that the California and Indiana legislatures could have
6 vested property rights directly in Marilyn Monroe following her death, as it is a general principle
7 of property law that "a dead man or woman may not take property." *In re Matthew's Estate*, 176
8 Cal. 576, 580 (1917); see also *State v. Hammons*, 126 S.W. 422, 424 (Mo. 1910) ("The accused
9 is therefore alleged to be the property of one not in life. This cannot be, for the dead cannot own
10 property. Death strips us of all rights and title to property and casts them on the living, who alone
11 can own property," quoting *Pleasant v. State*, 17 Ala. 190 (1850)); *Mohlke v. People ex rel.*
12 *Moore*, 17 Ill. App. 595, 1905 WL 1678, *2 (Ill. App. 1905) ("The statute refers to the property
13 concerning which the proceeding is instituted as 'belonging to any deceased person.' That
14 language taken literally does not state the legislative intent; a dead man can own no property;
15 there is no property 'belonging to any deceased person.' Some words must be supplied. If the
16 words 'at his death' are added, the phrase then reads 'belonging to any deceased person at his
17 death,' and is intelligible. . ."); *Espalla v. Gottschalk*, 10 So. 755, 757 (Ala. 1892) ("It is
18 necessarily true that death puts an end to all property ownership which had been in the decedent.
19 A dead man cannot own property. It does not, however, abrogate the title. That continues, and
20 passes at once to those on whom the law devolves it. It cannot be in abeyance").

21 ⁴⁷Plaintiffs' alternate argument that Marilyn Monroe's posthumous right of publicity vested
22 in her estate is inconsistent with the policy rationale they advance for finding that the right passed
23 by will. (See, e.g., Pls.' Supp. Brief at 19 ("Given the large number of celebrities who died prior
24 to 1985, it is likely that the rightful ownership in many instances would be in question or
25 altogether terminated. For example, Albert Einstein's statutory right of publicity is registered
26 with the California Secretary of State to the Hebrew University in Jerusalem ('Hebrew
27 University'), a university co-founded by Einstein, who died in 1955 but is still one of the highest
28 earning deceased personalities. Under the holding of the Tentative Order, the Hebrew University
would be divested of Albert Einstein's very valuable right of publicity, contrary to his
testamentary intent, because the Hebrew University is not one of the specified familial heirs under
the statute" (citations to record omitted)).) If testamentary intent overrides all other principles
of property and probate law, as plaintiffs suggest, that intent might well be thwarted by a finding
that a statutory right of publicity can pass through the will of a "personality" who died before
enactment of the statute creating the right if, but only if, the personality's estate remained open
at the time the statute took effect.

⁴⁸The court acknowledges that the revised Uniform Probate Code supports plaintiffs'
argument that "[a] will may provide for the passage of all property the testator owns at death and
all property acquired by the estate after the testator's death." UNIFORM PROBATE CODE § 2-602
(rev. ed. 1990); accord RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE
TRANSFERS § 1.1 & cmt. c (1999). The revised model probate code provision was expressly

1 for example, on *In re Brunet's Estate*, 34 Cal.2d 105 (1949), as support for the proposition that
2 California's and Indiana's statutory rights of publicity passed through Marilyn Monroe's will to
3 the beneficiaries of her residual estate.⁴⁹ *Brunet's Estate*, however, held only that, as used in a
4 layperson's will, the term "estate" did not have to be given its technical legal meaning, and could
5 be interpreted to effectuate the testator's intent. *Id.* at 107-08 (concluding that a bequest to an
6 individual "or his Estate" was intended to bequeath property to the named devisee or to his legal
7 heirs, devisees, or legatees in the event he predeceased the testator). A similar conclusion was
8 reached in another case cited by plaintiffs, *In re Albert*, 445 N.Y.S.2d 355 (Sup. Ct. 1981),⁵⁰
9 where the New York court was required to interpret the term "estate" as used in a trust document
10 drafted by a layperson who died prior to the litigation. *Id.* at 359-60 (concluding that it was
11 appropriate to interpret a trust provision that the remaining trust principal and interest be
12 distributed to the beneficiary's estate if he predeceased the trustor in light of the trustor's direction
13 that principal and interest be distributed to the beneficiary's surviving spouse and issue in the
14 shares appointed in his will, and limiting the individuals to whom the trust property could be
15 distributed through the estate to the beneficiary's spouse and issue). Neither case stands for the
16 proposition that an estate may "own" property. Each concerns how courts interpret the term
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19 intended to supersede the rule articulated in *Braman*, and allow "items such as bonuses awarded
20 to an employee after his or her death [to] pass under his or her will." UNIFORM PROBATE CODE
21 § 2-602 cmt. The Uniform Probate Code, however, does not save plaintiffs' right of publicity
22 claim, because neither New York or California has adopted the provision. Indeed, even had New
23 York or California adopted the provision following its promulgation in 1990, it is clear that it
24 would not control the passing of property under Marilyn Monroe's will. This is because the
25 construction or operation of a will is controlled by the law in force at the time of the testator's
26 death. See, e.g., *In re Gaffken's Will*, 188 N.Y.S. 852, 854 (App. Div. 1921) ("[F]or the
meaning and effect of the will we are to look to the law at time of the testator's death"), *aff'd*,
135 N.E. 971 (N.Y. 1922); see also CAL. PROBATE CODE § 6103 (providing that specified code
provisions governing wills do not apply where the testator died before January 1, 1985, but that
instead the law applicable prior to that date continues to apply).

27 ⁴⁹Pls.' Supp. Brief at 8.

28 ⁵⁰*Id.*

1 “estate” when used in documents drafted by lay people. As a result, the cases are inapposite.⁵¹

2 Equally inapposite is *In re Schunk*, 8 Misc.3d 1010(A), 2005 WL 1552844 (N.Y. Sur. Ct.
3 June 29, 2005) (Unpub. Disp.),⁵² which involved a dispute between the wife and the mother of a
4 decedent over the proper division of compensation recovered from the September 11th Victim
5 Compensation Fund.⁵³ The *Schunk* court merely concluded that the “the rules and regulations of
6 the Fund”⁵⁴ mandated that the “presumed non-economic loss for a decedent” of \$250,000 be
7 distributed according to the terms of the decedent’s will. *Id.* at *4.⁵⁵ As a result, *Schunk* does not

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9 ⁵¹Notably, Marilyn Monroe did not designate Lee Strasberg “or his estate” as the residual
10 beneficiary in her will. Even had she done so, however, this would not alter the court’s
11 conclusion that she could not devise a property right in 1962 that the California and Indiana
12 legislatures did not bestow on celebrities until decades after her death. To the extent plaintiffs
13 argue that *Brunet* and *Albert* – which involve the interpretation of wills and trusts – shed light on
14 proper interpretation of the California and Indiana statutes creating posthumous rights of
15 publicity, the court cannot agree. The cases are particularly inapposite for this purpose, in fact,
16 since neither statute purports to bestow property rights on deceased personalities’ “estates.”

17 ⁵²Pls.’ Supp. Brief at 12-13.

18 ⁵³In order to provide compensation to the victims of the September 11, 2001 terrorist
19 attacks, Congress created the September 11th Victim Compensation Fund as part of the Air
20 Transportation Safety and System Stabilization Act of 2001, Pub. L. No 107-42, §§ 401-409, 115
21 Stat. 230, 237-41 (codified as amended at 49 U.S.C. § 40101 note). The Department of Justice
22 subsequently adopted implementing regulations, which are codified at 28 C.F.R. §§ 104.1-71.

23 ⁵⁴*Id.* § 104.44.

24 ⁵⁵The court made no determination regarding distribution of the economic losses awarded
25 by the Fund, because the wife had withdrawn her consent to the distribution plan she and the
26 mother initially submitted to the Special Master. That plan contemplated that the economic loss
27 portion of the award would be distributed in accordance with the testamentary instructions in the
28 decedent’s will. *Schunk*, 2005 WL 1552844 at *2, 4. The court stated that it required additional
information to determine whether the Special Master calculated the award with reference to the
mother as well as the wife, and whether there might be an equitable basis for the mother to claim
a particular percentage of the award. *Id.* at *4. The alternative distribution arrangement sought
by the wife, moreover, did not rely on the terms of the decedent’s will, but on the “*Kaiser* rule”
used by New York courts to allocate wrongful death awards. The *Kaiser* rule provides that
distributees of the proceeds of a wrongful death action will receive a percentage of the award that
is in arithmetic proportion to the number of years they would have looked to the deceased for
support. See *Matter of Kaiser*, 100 N.Y.S.2d 218, 220 (Sur. Ct. 1950).

stand for the proposition that "New York . . . law expresses a willingness to allow property acquired after death . . . to pass through a decedent's will,"⁵⁶ as the case involved the interpretation of *federal* laws and regulations governing the compensation fund. Moreover, it appears that the Surrogate Court's interpretation of "the rules and regulations of the Fund" may have been incorrect. Rather than specifying that Fund awards should be distributed according to the terms of deceased victims' wills, the regulations state that the decedent's "personal representative"⁵⁷ should "distribute the [Fund] award [to the decedent's beneficiaries] in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction." See 28 C.F.R. § 104.52. They suggest, moreover, that the "beneficiaries" can include "the immediate family [members] of the decedent (including, but not limited to, the decedent's spouse, former spouses, children, other dependents, and parents)" as well as the "beneficiaries of the decedent's will." *Id.*, § 104.4; see also *id.*, § 104.52 ("Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives"). Hence, the regulations do not require that Fund awards pass according to the terms of the victims' wills; rather, they require that Fund awards be equitably distributed among all of a decedent's "beneficiaries," not just a testate victim's residuary legatees.

Plaintiffs' reliance on *Miller v. Glenn Miller Productions*, 318 F.Supp.2d 923 (C.D. Cal. 2004), *aff'd*, 454 F.3d 975 (9th Cir. 2006), is also misplaced. Plaintiff cite *Miller* for the proposition that California law has "expresse[d] a willingness" to allow property acquired after death to pass through a decedent's will.⁵⁸ *Miller* involved competing claims to Glenn Miller's statutory right of publicity, and was decided by Judge Howard Matz of this district. Like Marilyn

⁵⁶Pls.' Supp. Brief at 12.

⁵⁷See 28 C.F.R. § 104.4 (defining "personal representative").

⁵⁸Pls.' Supp. Brief at 12.